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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CRAIG M. FIELDS,

Plaintiff and Respondent,

v.

FOX ROTHSCHILD LLP et al.,

Defendants and Appellants.

B295928

(Los Angeles County
Super. Ct. No. BC719826)

APPEAL from an order of the Superior Court of
Los Angeles County, Dennis J. Landin, Judge. Affirmed.

Nemecek & Cole, Michael McCarthy, Mark Schaeffer and
Tommy Q. Gallardo for Defendants and Appellants
Fox Rothschild LLP and Mark H. Hess.

Glickman & Glickman and Steven C. Glickman for Plaintiff
and Respondent Craig M. Fields.

Subject to certain limitations and exceptions, Civil Code section 1714.10 (section 1714.10) requires a plaintiff to obtain a court order allowing the filing of a complaint against an attorney that alleges a civil conspiracy between the attorney and the attorney's client based on the attorney's representation of the client. (§ 1714.10, subd. (a).) Failure to obtain a prefiling order when required is a defense to the action for civil conspiracy, properly raised by demurrer. (§ 1714.10, subd. (b).)

Without obtaining a prefiling order, Craig M. Fields sued Fox Rothschild LLP and Mark H. Hess, one of the law firm's partners, for professional negligence and breach of fiduciary duty based on their conduct while representing Roberta Geller Fields regarding the administration of the Amended and Restated Gerald Fields Living Trust (Trust).¹ Fox Rothschild and Hess demurred to Craig's operative first amended complaint based, in part, on section 1714.10. The trial court overruled the demurrer because Craig had alleged the lawyer defendants breached a duty they independently owed to him, one of the statutory exceptions to the prefiling order requirement. (§ 1714.10, subd. (c)(1).)

Fox Rothschild and Hess appeal pursuant to section 1714.10, subdivision (d), which authorizes an immediate appeal from an order under the statute determining the rights of a party seeking a prefiling order or an attorney against whom a pleading has been filed or is proposed to be filed. We affirm.

¹ As do the parties, we refer to Roberta Geller Fields as Bobbie, Craig M. Fields as Craig and Gerald Fields as Gerald for simplicity and clarity.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Trust

Gerald, as grantor and trustee, executed the Trust on April 9, 2010. Bobbie, his third wife, and Craig, one of his two sons from a former marriage, were designated successor cotrustees, to act if Gerald “ceases to act, or for any other reason, including incapacity, is unable to act as Trustee.” Bobbie, Craig and Daren Fields, Craig’s brother, are the beneficiaries of the Trust. Gerald died on October 9, 2016.

2. Craig’s First Amended Complaint

Craig, individually and as cotrustee of the Trust, filed his original complaint on August 27, 2018 and the operative first amended complaint on September 28, 2018. In the first amended complaint Craig alleged Gerald retained Fox Rothschild and Hess in July 2012 to represent him regarding the Trust and other estate planning matters. Gerald lived in an assisted living facility from May 2014 until his death; but at some point prior to that time, Craig alleged, Gerald became incapacitated within the meaning of the Trust due to mental impairment.

Craig further alleged, although under the terms of the Trust he and Bobbie became successor cotrustees upon Gerald’s incapacity, Bobbie, with the assistance of Fox Rothschild and Hess, acted unilaterally, either under a power of attorney on behalf of Gerald or as successor cotrustee, to manage the Trust’s assets prior to, and for a period immediately after, Gerald’s death. Craig was only notified he was a successor cotrustee in November 2016, the month following Gerald’s death.

During the period of Gerald’s incapacity and immediately following Gerald’s death, Bobbie, with the knowledge and assistance of Fox Rothschild and Hess, made distributions of

trust assets to herself in violation of the terms of the Trust. Fox Rothschild and Hess, Craig alleged, failed to notify him of the distributions and failed to advise Bobbie she was required by the terms of the Trust not to make management decisions regarding the Trust's holdings or to make distributions to herself without the consent of her cotrustee. Specifically, Fox Rothschild and Hess assisted Bobbie in February 2015 in the sale of the home Gerald and she owned in Palm Desert and failed to notify Craig of the sale or of Bobbie's distribution to herself of \$325,000 in proceeds from that sale in violation of the terms of the Trust.

After Fox Rothschild notified Craig he was a successor cotrustee, he and Bobbie executed a retainer agreement with the firm. Fox Rothschild did not advise Craig that the firm had a conflict of interest because of its representation of Bobbie during the period of Gerald's incapacity and did not request a conflict waiver.

Craig additionally alleged that, during Gerald's incapacity and after his death, Fox Rothschild and Hess owed fiduciary duties to both successor cotrustees and to the Trust's beneficiaries, including the duty of loyalty, which they breached by failing to timely notify Craig he was a successor cotrustee or to advise Bobbie regarding her obligations as a cotrustee. As a result of their negligence and breach of fiduciary duty, Fox Rothschild and Hess damaged the Trust or Craig individually as a beneficiary of the Trust in the amount of at least \$1.2 million based on Bobbie's improper distributions and mismanagement of Trust assets.

Finally, Craig alleged that in January 2017 Fox Rothschild and Hess further aided and abetted Bobbie's breaches of fiduciary duty to Craig by advising Bobbie and/or the Trust's bookkeeper to

withhold information from Craig regarding the Trust's and Gerald's finances prior to the date of Gerald's death.

3. *The Demurrer and the Trial Court's Ruling*

Fox Rothschild and Hess demurred to the first amended complaint, contending they owed no duty to Craig as a trust beneficiary; Craig lacked standing to file the action as a successor cotrustee because he failed to join the other successor cotrustee (Bobbie); and Craig was required to obtain a prefiling order under section 1714.10 because his first amended complaint alleged, in effect, a conspiracy between Bobbie and the lawyers to breach Bobbie's fiduciary duties as successor cotrustee to Craig.

In opposition Craig argued he had standing based on Fox Rothschild and Hess's fiduciary duties to him under their written fee agreement, as well as a cotrustee and beneficiary under the Trust. He also asserted he could maintain the action without joining Bobbie as a party.² With respect to section 1714.10, Craig argued he had not alleged Fox Rothschild and Hess were liable based on a conspiracy with Bobbie; the section's prefiling requirement does not apply to an attorney's representation of a client in transactional activities as alleged in the first amended complaint; and he had alleged Fox Rothschild and Hess breached an independent duty they owed to him, falling within the subdivision (c)(1) exception to section 1714.10's prefiling requirement for conspiracy claims.

The trial court overruled the demurrer, rejecting all three grounds asserted by Fox Rothschild and Hess. As to duty and

² Craig alleged in his first amended complaint that Bobbie, because of her conflicts of interest and breaches of fiduciary duty, was unable to participate in an action on behalf of the Trust against Fox Rothschild and Hess.

standing, the court cited cases in which an attorney has been held to owe duties to nonclient will and trust beneficiaries and authority for the proposition a trust beneficiary may have standing to sue a third party when the beneficiary is the real party in interest for purposes of asserting the claims at issue. As for section 1714.10, quoting aiding-and-abetting language in the first amended complaint, the court observed, “[I]t can be reasonably inferred that Plaintiff is alleging a conspiracy against Defendants.” Even so, the court ruled, the independent duty exception in section 1714.10, subdivision (c)(1), applied because Craig had alleged Fox Rothschild and Hess “have violated and breached a duty that they independently owed Plaintiff.”

DISCUSSION

1. Section 1714.10

Section 1714.10 was originally enacted in 1988 in response to the court of appeal’s decision in *Wolfrich Corp. v. United Services Automobile Assn.* (1983) 149 Cal.App.3d 1206 (*Wolfrich*), which had held, although an insurance company’s attorneys could not be sued directly for violating Insurance Code section 790.03, they could be sued for conspiring with their client to commit unfair or deceptive acts or practices prohibited by the code. (*Id.* at p. 1211.) To prevent the assertion of conspiracy claims against attorneys “as a tactical ploy, particularly in actions against insurance companies” (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 718), former section 1714.10 required a prefiling judicial determination of probable merit for any claim against an attorney alleging the attorney had conspired with his or her client. (Stats. 1988, ch. 1052, § 1,

pp. 3407-3408;³ see *Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 390-391.)⁴ Enacted as part of the same legislation (Sen. Bill No. 2337 (1987-1988 Reg. Sess.)) that created the special motion to strike for cases arising from constitutionally protected petitioning and speech activity (Code Civ. Proc., § 425.16), the provisions were intended to “screen out meritless cases at an early stage” by requiring the plaintiff to demonstrate a probability of success on the merits. (*College Hospital Inc.*, at p. 718; see *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 207-208.)

In 1989 the Supreme Court in *Doctors’ Co. v. Superior Court* (1989) 49 Cal.3d 39 (*Doctors’ Co.*) disapproved *Wolfrich*, holding no claim for conspiracy to violate the Insurance Code could be maintained against an attorney retained by an insurance company to assist in the defense of an insured against a third-party claim. (*Doctors’ Co.*, at p. 41.) The Court relied on the doctrine, commonly referred to as the “agent’s immunity rule,” that “[a] cause of action for civil conspiracy may not arise . . . if the alleged conspirator, though a participant in the

³ As originally enacted, former section 1714.10 provided in part, “No cause of action against an attorney based upon a civil conspiracy with his or her client shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes a claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action. . . .” (Stats. 1988, ch. 1052, § 1, pp. 3407-3408.)

⁴ The Legislature expressly declared its intent “in enacting this measure to modify the decision of the Court of Appeal in *Wolfrich*.” (Stats. 1988, ch. 1052, § 2, p. 3408.)

agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing and was acting only as the agent or employee of the party who did have that duty.” (*Id.* at p. 44.) The Court held, “Because the noninsurer defendants are not subject to [the only statutory duty toward plaintiff claimed to have been breached] and were acting merely as agents of the insurer ‘and not as individuals for their individual advantage’ [citation], ‘they cannot be held accountable on a theory of conspiracy.’” (*Id.* at p. 45.)

The Court, however, explained, “It remains true, of course, that under *other* sets of circumstances ‘[attorneys] may be liable for participation in tortious acts with their clients, and such liability may rest on a conspiracy’ [citations]. For example, an attorney who conspires to cause a client to violate a statutory duty peculiar to the client may be acting not only in the performance of a professional duty to serve the client but also in furtherance of the attorney’s own financial gain.” (*Doctors’ Co.*, *supra*, 49 Cal.3d at p. 46.) Additionally, a claim may lie “against an attorney for conspiring with his or her client to cause injury by violating the attorney’s own duty to the plaintiff.” (*Id.* at p. 47.)

Following the decision in *Doctors’ Co.*, the Legislature debated whether the need for section 1714.10 had been eliminated. (See Sen. Com. on Judiciary, com. on Sen. Bill No. 820 (1991-1992 Reg. Sess.) May 7, 1991, p. 4 [“[i]t is unknown whether there is a need for pleading hurdles to protect attorneys from the type of civil conspiracy claims permitted under the *Doctors’ Company* rational[e]”]; *Pavicich v. Santucci*, *supra*, 85 Cal.App.4th at p. 393.) Ultimately, the statute was amended in 1991 to apply only to situations in which it was alleged an attorney had engaged in a conspiracy with his or her client

“arising from any attempt to contest or compromise a claim” (Stats. 1991, ch. 916, § 1, p. 4108)⁵ and to create, in a new subdivision (c), exceptions from the procedural requirements of section 1714.10 for the two situations described in *Doctors’ Co.*: “[W]here (1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney’s acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney’s financial gain.” (See *Pavicich*, at pp. 393-394 [discussing legislative history of 1991 amendment to section 1714.10]; see also *Favila v. Katten Muchin Rosenman LLP*, *supra*, 188 Cal.App.4th at pp. 208-209.) “As recognized by a number of courts, ‘the effect of the amendment on the statute’s application is anomalous. Since the statute now removes from its scope the two circumstances in which a valid attorney-client conspiracy claim may be asserted, its gatekeeping function applies only to attorney-client conspiracy claims that are not viable as a matter of law in any event.’” (*Cortese v. Sherwood* (2018) 26 Cal.App.5th 445, 454 (*Cortese*).)

2. Standard of Review

We review de novo the trial court’s order denying Fox Rothschild and Hess’s demurrer on the ground no prefiling order

⁵ Section 1714.10, subdivision (a), now provides in part, “No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney’s representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action.”

was required by section 1714.10. (*Klotz v. Milbank, Tweed, Hadley & McCloy* (2015) 238 Cal.App.4th 1339, 1349; *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 822.) We affirm the order if it is correct on any ground argued by the parties in the trial court regardless of the trial court's stated reasons for its ruling. (See *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967; *Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 374.)

Applying section 1714.10 requires the court to initially determine whether the pleading falls within the coverage of subdivision (a) of the statute. If it does, "the next step is to ascertain whether the pleaded claims fall within either of the exceptions set forth in subdivision (c) of the statute." (*Stueve v. Berger Kahn* (2013) 222 Cal.App.4th 327, 331; accord, *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.*, *supra*, 131 Cal.App.4th at p. 824.)

3. *Fox Rothschild and Hess's Alleged Misconduct Does Not Fall Within the Plain Wording of Section 1714.10, Subdivision (a)*

As discussed, subject to the exceptions in subdivision (c), section 1714.10, subdivision (a), applies to causes of action for civil conspiracy against an attorney based on conduct arising from the representation of a client in connection with "any attempt to contest or compromise a claim or dispute." In his opposition to Fox Rothschild and Hess's demurrer and again on appeal, Craig argues, even if the aiding-and-abetting allegations in his first amended complaint are properly construed to allege a conspiracy,⁶ the section 1714.10 prefiling requirement is

⁶ While recognizing a cause of action asserting liability based on a theory of aiding and abetting and one based on conspiracy

inapplicable because neither his professional negligence nor breach of fiduciary duty cause of action is based on the attorneys' representation of Bobbie in contesting or attempting to resolve a disputed claim. Rather, he explains, as in *Stueve v. Berger Kahn*, *supra*, 222 Cal.App.4th 327, the lawyers' misconduct at issue involved "transactional activities—the siphoning off of assets" from the Trust by Bobbie, in breach of her fiduciary duties, with the active assistance of Fox Rothschild and Hess. (See *id.* at p. 331.)

require proof of different elements, several courts of appeal have suggested an attorney's participation in a fiduciary's breach of duty by aiding and abetting the fiduciary falls within the ambit of section 1714.10. (See, e.g., *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.*, *supra*, 131 Cal.App.4th at p. 823, fn. 10; *Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 749.) Because we conclude Craig's first amended complaint does not allege Fox Rothschild and Hess are liable for misconduct while attempting to contest or compromise a claim or dispute, we need not consider whether we agree with that analysis.

Similarly, we need not decide whether the trial court correctly ruled Craig's first amended complaint fell within the exception in section 1714.10, subdivision (c)(1), for conspiracy causes of action alleging the attorney had an independent legal duty to the plaintiff. However, as discussed, in rejecting an independent ground for Fox Rothschild and Hess's demurrer, the court ruled Craig had adequately pleaded the attorneys owed him fiduciary duties both as a successor cotrustee and as one of the beneficiaries of the Trust. That separate ruling is not directly before us on appeal. (See *Klotz v. Milbank, Tweed, Hadley & McCloy*, *supra*, 238 Cal.App.4th at p. 1349 [section 1714.10, subdivision (d), only permits immediate appeal of ruling on special demurrer based on section 1714.10].)

In the Stueve family litigation heirs to the Alta Dena Dairy fortune filed a multicount lawsuit alleging that attorney Raymond Novell, a family friend, set up a series of trusts with himself as trustee and then, with the assistance of estate planning attorney Jay Wayne Allen and the Berger Kahn law firm, among others, stole \$25 million dollars from the composite family estate through a complex set of transactions. The operative pleading included causes of action for fraud, breach of fiduciary duty and professional negligence. Berger Kahn demurred and filed a motion to strike all allegations that it had conspired with its client Novell to defraud the Stueves because the Stueves failed to comply with section 1714.10. The trial court sustained the demurrer without leave to amend and granted the motion to strike.

In *Stueve v. Berger Kahn, supra*, 222 Cal.App.4th 327 the court of appeal reversed the order granting the motion to strike the conspiracy allegations, agreeing with the Stueves that their claims “arose from transactional activities—the siphoning off of assets through fraudulent estate planning, including the misappropriation of the Stueves’ assets through the diversion of those assets to entities created and controlled by the defendants, including Berger Kahn’s other clients”—and holding, “[T]he alleged schemes do not fall within the plain wording of section 1714.10, subdivision (a), which requires court permission to file an attorney-client conspiracy claim ‘arising from any attempt to contest or compromise a claim or dispute.’” (*Id.* at p. 331.)⁷

⁷ In *Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, a companion appeal, the court reversed the

In reversing the order striking the Stueves' conspiracy allegations, the court of appeal rejected Berger Kahn's argument that section 1714.10 has been applied "in many situations outside of the context of litigation or contested claims." (*Stueve v. Berger Kahn, supra*, 222 Cal.App.4th at p. 332.) In some of the cases Berger Kahn had cited, the court explained, only the exceptions contained in section 1714.10, subdivision (c), were addressed, not the language of subdivision (a), "based on the way the parties framed the issues, or for apparent ease of analysis." (*Stueve*, at p. 332.) In other cases cited by Berger Kahn, "there was no need for an in-depth analysis of subdivision (a), because it was readily apparent that the alleged conspiracies did indeed arise from an 'attempt to contest or compromise a claim.'" (*Id.* at p. 333.)

In contrast to the lawyer misconduct alleged in the *Stueve* cases, in *Cortese, supra*, 26 Cal.App.5th 445 Christina Cortese alleged that her deceased stepfather had breached fiduciary duties to her deceased mother and to her mother's trust and that her stepfather's estate planning attorney, John Sherwood, had facilitated those breaches of fiduciary duty. She further alleged that, after her mother's death, she questioned the low value of the estate and that Sherwood told her the estate had been devalued for tax purposes and that she had no reason to be concerned because she would be a wealthy woman when her stepfather died, confirming promises her stepfather had earlier made to her. Relying on those representations, Cortese did not challenge her stepfather's acts as executor of her mother's estate. (*Id.* at p. 451.) Ultimately, however, her stepfather did not name her as a beneficiary of his estate. (*Id.* at p. 452.)

trial court's order sustaining Berger Kahn's demurrer and the judgment in its favor.

Reversing the trial court's order overruling Sherwood's demurrer to Cortese's cause of action alleging Sherwood was complicit with her stepfather's breaches of trust, the court of appeal held Sherwood's conduct as alleged arose from an attempt to contest or compromise a claim or dispute within the meaning of section 1714.10, subdivision (a). The court explained, "The phrase 'arising from any attempt to contest or comprise a claim' suggests that statute's prefiling requirements apply 'to situations in which the alleged conspiracy arose from the attorney's representation of his or her client in a previous or current legal dispute or litigation with the plaintiff.' [Citation.] But the dispute need not have matured into litigation for section 1714.10's prefiling requirements to apply. . . . Cortese's allegations that Sherwood induced her not to challenge [her stepfather's] actions as executor of [her mother's] estate and trustee of her trust qualify as conduct arising from the compromise or settlement of a dispute." (*Cortese, supra*, 26 Cal.App.5th at p. 457.)

Fox Rothschild and Hess acknowledge section 1714.10, subdivision (a), applies only to alleged conspiracies relating to efforts to contest or compromise a claim or dispute, but argue that requirement was satisfied here because Craig alleged they had a conflict of interest when advising Bobbie during Gerald's incapacity and immediately after his death, assisting her in conflict with his own interests, rather than providing legal services to both Bobbie and Craig jointly as successor cotrustees. As alleged, however, Fox Rothschild and Hess's representation of Bobbie concerned her management and disposition of Trust assets: Craig contends Fox Rothschild and Hess aided and abetted Bobbie in committing breaches of trust that favored her

interests to the detriment of his—all conduct easily within the broad category of “transactional activities.” To be sure, as Fox Rothschild and Hess assert, their legal advice created the dispute concerning Bobbie’s purported misappropriation of Trust assets. But it did not include any efforts, real or feigned (as was the case in *Cortese*), to resolve that dispute or to contest Craig’s claims against Bobbie or her lawyers. As in *Stueve v. Berger Kahn, supra*, 222 Cal.App.4th at page 331, “the alleged schemes do not fall within the plain wording of section 1714.10, subdivision (a).” (But see *Klotz v. Milbank, Tweed, Hadley & McCloy, supra*, 238 Cal.App.4th at p. 1352 [partner’s request for advice regarding his withdrawal from a partnership and a new business opportunity that potentially conflicted with the partnership’s interests constituted “the provision of services in connection with the settlement of a claim or dispute”].)

DISPOSITION

The trial court’s order overruling the demurrer on the ground no prefiling order was required is affirmed. Craig is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

DILLON, J.*

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.